Supreme Court, U.S.
FILED
FEB 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1404

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1989

No. _____

MICHAEL CAMERON AND
KAREN CAMERON,

Petitioners,

vs.

BEELER, SCHAD AND DIAMOND, P.C.
an Illinois professional corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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January 29, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is proper to apply the state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship.

2. Whether the District Court and the Court of Appeals can disregard an unambiguous mandatory jury instruction proposed by the plaintiff and substitute their own judgment as to what the evidence proved in spite of the jury's contrary verdict.

LIST OF PARTIES

The parties listed in the caption of this case are a complete listing of the parties to this petition.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit is set forth in Appendix A. (Beeler, Schad & Diamond, P.C. v. Michael Cameron and Karen Cameron, Nos. 89-1327 and 89-1440 unpub. op. (January 8, 1990). The denial of Petitioner's Petition for Rehearing is set forth in Appendix B. The decision of the United States District Court for the Northern District of Illinois, Eastern Division denying JNOV and entering judgment in favor of Respondent is set forth in Appendix C.

JURISDICTION

The Court of Appeals entered judgment on January 8, 1990. The Court of Appeals then denied the petitioners request for a rehearing on January 22, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the Constitution provides in pertinent part:

"...the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Article III Section 2 of the Constitution provides in pertinent part:

"The judicial power shall extend to all cases...between citizens of different states..."

STATEMENT OF THE CASE

In the early 1980's Petitioner, Michael Cameron, hired his brother-in-law, Eugene Beeler, a partner in the respondent law firm, to do some miscellaneous legal work for him. (Tr. 240, 242). Their business relationship gradually grew in direct proportion to the Petitioner's business successes. (TR 240-245). The respondent, Beeler, Schad and Diamond, P.C., also worked on several business acquisitions for the Petitioners. Some of this acquisition work resulted in the Petitioners acquiring a controlling interest in several companies. Some did not. (TR 35-40).

In September, 1985, Petitioners started making inquiries into the acquisition of PET MILK, Inc., a division of IC Industries. (TR 67-70, R. 78). This was to be the largest acquisition attempt

involving both of the parties. Petitioner contacted Mr. Schad of the Respondent and requested their legal assistance. Mr. Schad agreed with Petitioner that the respondent would represent Petitioners on the attempt to acquire the PET MILK facilities. (TR. 70)

During Mr. Cameron's and Mr. Schad's conversations, the issue of Respondent's fees was discussed. (TR. 70-71). Petitioners informed Mr. Schad that the leading lender wanted Mr. Cameron to provide a breakdown of the closing costs, including projected attorney's fees. (TR. 70-71). Mr. Cameron then asked Mr. Schad if he would prepare an estimate of a set fee that would reflect the entire cost of Respondent's fee. (TR. 72-73). That estimate would then be included with the other costs in the breakdown that was being sent to the lender. (TR. 71).

On October 8, 1985, Mr. Schad sent a letter estimating the Respondent's fee to be $525,000. (TR. 132-133, 140-141, 199). That estimate was then included in the breakdown of expected closing costs. Very little else was said about the $525,000 amount until the fall of 1986 when the

Petitioners fired the Respondent and requested return of their files. (TR. 107, 267). By this time, the PET deal had fallen apart and Mr. Cameron had become dissatisfied with Respondent's performance. (TR. 267).

On October 10, 1986, the Respondent sent the Petitioners a bill for the alleged "fixed fee" of $525,000. (TR. 113-114). On October 15, 1986, the Respondent filed this action alleging seven different breach of contract claims. The basis for federal jurisdiction in the court of first instance was diversity of citizenship. The Respondent alleged that the fee on the PET MILK claim was based on an express contract. The Petitioners denied entering into any such contract.

The contract claims were eventually tried to a jury. The jury was instructed on the PET MILK claim that if they found the existence of a fixed fee contract then they must award the Respondents $525,000 plus costs. On November 3, 1988, the jury found for the Respondent but only awarded $475,000 plus costs. The Petitioners filed motions for a directed verdict and for a judgment notwithstanding the verdict which challenged the sufficiency of the

evidence and the correctness of the jury's verdict. The district court denied both motions.

The Petitioners then appealed to the Seventh Circuit where the same issues of sufficiency were raised. In an unpublished opinion, the Seventh Circuit applied the Illinois sufficiency of the evidence standard and found that the trial court had acted properly in upholding the jury verdict. Petitioners filed a petition for rehearing which the Seventh Circuit later denied.

REASONS FOR GRANTING THE WRIT

1. The main issue raised by this case, the proper standard to apply to a sufficiency of the evidence motion in a diversity case, is a crucial and unsettled issue in the Circuits. This Court previously identified this issue in Dick v. New York Life Insurance Co., 359 U.S. 437, 444-445 (1959) and certified the issue to be an "important question." (See also Mercer v. Theriot, 377 U.S. 152, 156-157 (1964) (Mr. Justice Harlan, dissenting). The importance of this issue has not diminished with the passage of time. Thirty years later the debate continues between the Circuits as to which standard - state or federal - should be

applied in a diversity case. Jones v. Wal-Mart Stores, Inc. 870 F. 2d. 982, 986-987 (5th Cir. 1989) (follows federal standard) and Thor Power Tool Co. v. Weintraub, 791 F. 2d. 579, 583 (7th Cir. 1986) (follows state standard). Currently, the Fourth, Fifth, Eighth, Ninth, and Tenth Circuits follow the federal standard.

I 4th Circuit - Bryan v. Merrill Lynch Pierce Fenner & Smith Inc., 565 F. 2d. 276 (4th Cir. 1977)

5th Circuit - Wal-Mart, supra; Gideon v. Johns-Mannville Sales. Corp., 761 F. 2d. 1129, 1143 (5th Cir. 1985); Boeing Co. v. Shipman, 411 F. 2d. 365, 368-369, n. 2-4 (5th Cir. 1969)

8th Circuit - Farner v. Paccar, Inc. 562 F. 2d. 518 (8th Cir. 1977)

9th Circuit - Neely v. St. Paul Fire and Marine Insurance Co., 584 F. 2d. 341, 345 (9th Cir. 1978); But compare Longenecker v. General Motors Corp. 594 F. 2d 1283, 1285 (9th Cir. 1979)

10th Circuit - Peterson v. Hager, 714 F. 2d. 1035, 1037 (10th Cir. 1983) on rehearing, 724 F. 2d 851, 853 (10th Cir. 1983); FDIC v. Palermo, 815 F. 2d. 1329, 1335 (10th Cir. 1987).

In contrast, the Second, Sixth, Seventh, and Eighth[2] Circuits adhere to the state standards.[3] The almost equal division among the Circuits calls for the exercise of this Court's power of

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[2] The Eighth Circuit has an internal conflict in its own application of the appropriate standard. In some cases, it applies the federal standard Farner, supra. However, depending on the parties inaction to request the application of the federal standard, the Eighth Circuit will apply the state standard if the state and federal standards are essentially identical. De Witt v. Brown, 669 F. 2d. 516 (8th Cir. 1982); R.W. Murray Co. v. Shatterproof Glass Corp., 758 F. 2d 266,270 (8th Cir. 1985).

[3] 2nd Circuit - Simblest v. Maynard, 427 F. 2d. 1, 5 (2nd Cir. 1970); See also San Antonio v. Timko, 368 F. 2d 983, 985 (2nd Cir. 1966); Mull v. Ford Motor Co. 368 F. 2d. 713, 716 n. 4 (2nd Cir. 1966); Eldred v. Town of Barton, New York, 505 F. 2d. 186, 187 n. 2 (2nd Cir. 1974)
6th Circuit - Calhoun v. Honda Motor Co., Ltd., 738 F. 2d. 126 (6th Cir. 1984)
7th Circuit - Tacket v. General Motors Corp., 836 F. 2d. 1042, 1045 (7th Cir. 1987)
8th Circuit - De Witt v. Brown, 669 F. 2d. 516 (8th Cir. 1982)

supervision to establish a universal rule to be applied by all Circuits.

In this case, the Seventh Circuit stated that Illinois law governed this diversity action. It further found that, "[u]nder Illinois law, 'judgment not withstanding the verdict is properly granted by a trial court only when the evidence is so overwhelmingly in favor of the movant that no contrary verdict based on the evidence could ever stand.' [citation omitted]. That strict standard was not met." Beeler Schad and Diamond, P.C. v. Michael and Karen Cameron, Nos. 89-1327 and 89-1440 unpublished op. at p. 3 (7th Cir. January 8, 1990). (See App. Ex. A) In contrast, the federal standard has been defined as "when all the inferences to be drawn from the evidence are so in favor of the moving party that reasonable persons could not differ in their conclusions." FDIC v. Palermo, 815 F. 2d. 1329, 1335 (10th Cir. 1987). The differences between the state standards and the federal standard cause the application of stricter standards, as in this case, or in the application of different standards even in the same Circuit. (Compare Farner v. Paccar, supra to De Witt v.

Brown, supra [8th Circuit]). Under the state standard approach, federal courts must apply the particular state of jurisdiction's rules which may conflict with other state standards within the same Circuit. As such, the federal courts are presented, with the situation where they would have to apply 50 often-times similar but different standards under the state standard approach. The federal judiciary should not be required in these diversity actions to decide which standard should be applicable to a motion for JNOV or a directed verdit. (FDIC v. Palermo supra, 815 F. 2d. at 1335. - same standard applies to motions for JNOV and directed verdict.). "Federal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve 'the essential character' of the federal judicial system." Boeing Company v. Shipman, 411 F. 2d. 365, 369-370 (5th Circuit 1969).

In Dick, this Court found that the issue here was an important one but was not one that was properly before this Court at that time. Id. 359 U.S. at 445. The reasons cited for the refusal to

decide this issue in Dick were:

1. Both parties assumed that the state standard applied;

2. Even though the Court of Appeals applied the state standard, that court did not discuss the issue;

3. The two standards were essentially the same; and

4. The decision as to which standard should be applied should be left to another case where the issue was briefed and argued. Id.

The instant case is that other case where the issue is ripe for decision. The parties raised the issue of different standards in their briefs. The Illinois standard, as noted by the Seventh Circuit, is a more strict standard. The Seventh Circuit considered the issue and ruled unequivocally that the Illinois standard applied. Lastly, the Petitioners never assumed that the state standard of review applied. This Court recognized in Dick, that the issue of the proper standard to apply to a motion for JNOV in a diversity case is an important one. The facts and legal rulings in this case allow the Court to finally resolve this issue and to finally promulgate a single, unified standard among all of

the Circuits. For all of the foregoing reasons, this Court should accept jurisdiction and grant this petition.

2. The second issue in this case presents a situation where the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings and as a result has sanctioned such a departure by the lower court that an exercise of this Court's power of supervision is necessary. This issue concerns the lower court's improper interpretation of the jury's verdict in relation to the unambiguous and unequivocal jury instructions that the plaintiff submitted.

In this case, the following jury instruct ion was given to the jury:

> With respect to Beeler, Schad and Diamond's claim with respect to fees and costs relating to the PET MILK acquisition, if you find that there was an agreement to pay a fixed fee of $525,000 plus costs then you must award Beeler, Schad and Diamond $525,000 plus $24,868.31 in costs for a total of $549,868.31.
>
> If you find that there was no agreement to pay a fixed fee of $525,000 plus costs, you must then determine the fair and reasonable compensation for those services.

After its deliberation, the jury awarded the plaintiff $499,868.31. On appeal, the Petitioners argued that the jury's verdict reflected that no fixed fee contract was found and that the jury had awarded an inflated damages amount in quantum meruit.

The Seventh Circuit did not address the issue of the conflict between the specific instruction and the jury's verdict. Instead, the Seventh Circuit merely found that,

> Since the plaintiff had decided to reduce its fee by $50,000, it was appropriate for the jury to return a verdict for $475,000 plus the out-of-pocket expenses of $24,868.31. In view of the jury's acceptance of plaintiff's version of the fee contract, there is no need to consider the alternative quantum meruit theory advanced by the Beeler firm. (Beeler, Schad and Diamond, P.C., supra at p. 4).

The Seventh Circuit's decision is in conflict with this Court's and that Circuit's own decisions concerning the proper interpretation of the jury's use of the jury instructions.

In City of Los Angeles v. Heller, 475 U.S. 796, 798 (1986) this Court stated that "the theory under which jury instructions are given by trial

courts and reviewed on appeal is that juries act in accordance with the instructions given them [citation omitted] and that they do not consider and base their decisions on legal questions with respect to which they are not charged." The Seventh Circuit in other cases has followed the Heller rule. Pomer v. Schoolman, 875 F. 2d. 1262, 1267 (7th Cir. 1989).

In this case, the Seventh Circuit refused to follow the Heller rule. The fixed fee instruction was a mandatory instruction that was not subject to interpretation. The "must award" language required that any verdict less than $525,000 was a verdict against a fixed fee contract and for a damages determination in quantum meruit. The jury was never instructed that they could reduce the $525,000 by $50,000 because to do so would have been inconsitent with the theory of a fixed fee contract. Nevertheless, the Seventh Circuit found that the jury accepted the Respondent's view of the fixed fee contract less a $50,000 credit. This finding is contrary to the assumptions stated in Heller and Pomer. The Seventh Circuit's unsupported interpretation is a gross departure

from the accepted and usual course of judicial proceedings. The impact of this decision on the Petitioner is that the evidence showed that the Petitioners owed far less in quantum meruit than what the jury eventually awarded. The Seventh Circuit's erroneous interpretation gives the Respondent a windfall to which it is not entitled.

The Petitioners ask this Court to grant its petition and take jurisdiction over this issue also. Alternatively, the petitioners request that if this Court is inclined to deny their petition, then this Court should exercise its power of supervision, as it did in Heller, summarily reverse the Seventh Circuit's opinion and send this case back to the district court for a recalculation of damages in quantum meruit.

CONCLUSION

The decision below, on issues deemed important by this court, represents the conflict among the Circuits concerning the proper sufficiency of the evidence standard in a diversity jurisdiction case and a departure from the accepted and usual interpretation of jury instructions. These issues are not only important

to the parties to this case but also to the entire federal court system at large. For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, IL 60604

Argued December 1, 1989

January 8, 1990.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

BEELER, SCHAD & DIAMOND, P.C., an Illinois professional corporation, Plaintiff-Appellee, Cross-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 89-1327 89-1440 vs.	
MICHAEL CAMERON AND KAREN CAMERON, Defendants-Appellants Cross-Appellees.	No. 86 C 7789 James B. Zagel Judge.

ORDER

Plaintiff is a Chicago law firm whose partners consist of Eugene W. Beeler, Jr., Lawrence W. Schad, and Stephen B. Diamond. In this diversity action, the firm has sued Mr. Beeler's brother-in-law, Michael Cameron, and his wife Karen for unpaid legal fees and prejudgment interest thereon. Following a trial, the district court awarded plaintiff $768,314.35 plus prejudgment interest in the amount of $32,583.16 for work the law firm

performed for the Camerons with respect to certain transactions. However, this appeal involves only the law firm's work relating to the proposed acquisition of the Pet Dairy Division of IC Industries. The judgment in respect of that matter amounted to $499,868.31, but the jury did not award prejudgment interest on that segment. Plaintiff asserts that under Florida law it is entitled to receive 12% per annum prejudgment interest on its Pet Dairy claim. Defendants seek reversal or other relief as to the Pet Dairy fee award. We affirm the award as approved by the district court.

The Camerons are residents of Florida. In 1982 they retained the plaintiff law firm to perform legal work regarding Sunshine Water Company. Thereafter the law firm performed acquisition work for the Camerons as they acquired and attempted to acquire other companies. Count VI of the complaint is the only count involved in this appeal and involved legal fees in excess of $500,000 allegedly owed by the Camerons in connection with their proposed Pet Dairy acquisition. According to trial testimony, Mr. Cameron asked Mr. Schad to quote a fixed fee for

the projected law work involved in acquiring Pet Dairy. The law firm estimated that the fixed fee would be $525,000, a quotation that was approved by Mr. Cameron. Eventually IC Industries decided to sell Pet Dairy to another buyer, but Mr. Cameron, again according to trial testimony, promised to pay the plaintiff's fee as soon as he could.

In late summer 1986, the law firm was told by one of the Camerons' employees that Mr. Cameron planned to engage other attorneys. Consequently, plaintff billed the Camerons for the fixed fee on Pet Dairy as well as for other unpaid fees and costs. Mr. Schad deducted $50,000 from the quoted $525,000 Pet Dairy fixed fee in the hope of immediate payment. He added $24,868.31 in out-of-pocket costs for a total of $499,868.31, which was the amount awarded by the jury.

Denial of Defendants' Motion for Leave to File Additional Affirmative Defenses

On December 4, 1987, defendants filed a motion for leave to file additional affirmative defenses stating that (1) plaintiff's claims were barred in whole or in part because some of them were already paid, and (2) defendants were entitled to an offset

or credit in an amount equal to any overpayments. This motion was filed 14 months after the commencement of the lawsuit and after discovery had been closed.[1] Moreover, if this motion had been granted, the plaintiff would have had to resume discovery on the eve of the pretrial conference.[2] Therefore the trial court's refusal to permit additional affirmative defenses was justified by undue delay.

Judge Zagel explained his refusal to permit filing of additional defenses in an oral opinion of July 14, 1988. He reasoned that defendants were resting these additional defenses on a purported oral agreement between Mr. Cameron and plaintiff which predated the defendants' answer and should have been included therein. Therefore the court concluded that "defendants' failure to assert these [additional] defenses prior to December 1987, or a year after the complaint was filed and after the close of discovery, constitutes undue delay." Defendants' App. B at 8. The court also rejected defendants' argument that they were unable to plead the additional defenses earlier on the ground that Count VI, concerning the fee for the Pet Dairy

matter, was vague . The judge explained that if defendants thought Count VI was vague they should have filed an appropriate motion before answering the complaint or within a reasonable time there after. For theses reasons, defendants' asserted reasons for the delay were found to be unpersuasive. Defendants' App. B at 10. Judge Zagel also recognized that permitting these new defenses would have required the plaintiff to take additional discovery. As a result, Judge Zagel found that denial of the motion to file the

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[1]Discovery was closed on November 30, 1987, by order of July 29, 1987, but defendants secured an extension of the close of their discovery until January 18, 1988.

[2]The December 28, 1987, pretrial conference was rescheduled to January 19, 1988, and eventually held on October 14, 1988. The trial commenced on November 1, 1988.

additional defenses was justified under this Court's holding in Feldman v. Allegheny Int'l, Inc., 850 F. 2d 1217, 1225-1226 (1988).

Referring to an unpublished Sixth Circuit opinion, Frohilich v. Montgomery Elevator Co., 714 F. 2d 139 (6th Cir. 1983) (text available on LEXIS), the district judge determined that permitting the proposed amendment would amount to a "prejudice to the parties in the settlement process." Defendants' App. B at 11. Finally, mentioning Tamari v. Bache & Co., 838 F. 2d 904, 908-909 (7th Cir. 1988), Judge Zagel held that granting the motion to amend by adding additional defenses would have an adverse effect on other litigants and on the court system.

We agree with the district court and conclude that the denial of the defendants' motion for leave to file additional affirmative defenses was not an abuse of discretion.

Denial of Motion for Judgment Notwithstanding the Verdict

Defendants next argue that the district court erred in denying judgment notwithstanding the

verdict as to the Pet Dairy claim because the verdict was against the manifest weight of the evidence. That is not the correct standard on appeal. In this diversity action Illinois law governs. Under Illinois law, "judgment notwithstanding the verdict is properly granted by a trial court only when the evidence is so overwhelmingly in favor of the movant 'that no contrary verdict based on the evidence could ever stand.'". Thor Power Tool Co. v. Weintraub, 791 F. 2d 579, 583 (7th Cir. 1986) (citations omitted). That strict standard was not met. It was a jury question whether the parties had agreed to a fixed fee of $525,000 for the Pet Dairy acquisition or whether that was merely an estimate. On the evidence before it, it was also permissible for the jury to credit plaintiff that the Camerons were to pay the out-of-pocket expenses. Since the plaintiff had decided to reduce its fee by $50,000, it was appropriate for the jury to return a verdict for $475,000 plus the out-of-pocket expenses of $24,868.31. In view of the jury's acceptance of plaintiff's version of the fee contract, there is no need to consider the alternative quantum meruit

theory advanced by the Beeler firm.

Defendants assert that only $213,765.50 or $213,784.50 was owed (Br. 19, 22; Reply Br. 6) because an internal record of plaintiff showed this amount as unbilled on April 30, 1986 (App. Ex. E). Yet their cross-examination of plaintiff's partner Stephen Diamond suggested that this was unbilled "work in progress" for the Pet Dairy transaction. See. Tr. 348-350. Rather than an invoice, he described it as "some kind of a summary report *** that our computer system prepares" (Tr. 348). Absent further testimony or documentary evidence, the record does not support a remittitur to $213,784.50 in the light of the credited testimony that there was a fixed fee agreement for $525,000.

Defendants also maintain that they should have been entitled to argue that plaintiff's fee was excessive under Disciplinary Rule 2-106(a) and (b) of the Illinois Code of Professional Responsibility (reproduced in Ill. Rev. Stat. ch. 110A under Canon 2). The district court did not permit this provision of the Code of Professional Responsibility to be used as an affirmative defense. Instead the court ruled that defendants

were free to submit evidence to support their position that plaintiff's fee was unreasonable. Defendants did not even suggest this Code defense until after the court had already denied their motion to add other new defenses after the close of discovery. The subsequent decision against the use of the ethical guideline was in harmony with the court's permissible previous order denying defendants' belated attempt to add other additional defenses. In any event, the refusal of this tendered defense was harmless because defendants were permitted to try to show that the fee the law firm charged was excessive.

Prejudgment Interest

Plaintiff asserts that the district court should have awarded it 12% prejudgment interest on the $499,868.31 Pet Dairy fee award on the ground that Florida law is applicable and, unlike Illinois law, does not require a showing of vexatious delay and would permit a 12% rate of interest. Because plaintiff chose an Illinois forum, Illinois conflict of laws rules apply. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487. Illinois applies the "most significant

relationship" test. Ingersoll v. Klein, 262 N.E. 2d 593, 596 (Ill. 1970). Under that test, it is clear that Illinois prejudgment interest law applies, as the district judge explained in his oral order. Since plaintiff does not contend that it has satisfied the vexatious delay requirement imposed upon it by Illinois law, it was not entitled to the requested 12% prejudgment interest under Count VI.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, IL 60604

January 22, 1990.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

BEELER, SCHAD & DIAMOND, P.C., an Illinois professional corporation, Plaintiff-Appellee, Cross-Appellant, vs. MICHAEL CAMERON AND KAREN CAMERON, Defendants-Appellants Cross-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 86 C 7789 James B. Zagel, Judge.

Nos. 89-1327
89-1440

ORDER

On consideration of the petition for rehearing filed by defendants-appellants on January 12, 1990, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEELER, SCHAD & DIAMOND, P.C. an Illinois professional corporation,	)	
Plaintiff-Appellee, Cross-Appellant,	)	
vs.	)	Case No. 86 C 7789
MICHAEL CAMERON AND KAREN CAMERON,	)	
Defendants-Appellants, Cross-Appellees.	)	

Date: November 18, 1988

ORDER

Judgment is entered as follows:

Enter judgment on jury verdicts in favor of plaintiff, Beeler, Schad & Diamond and against defendants Michael Cameron and Karen Cameron in the total amount of $768,314.35 plus prejudgment interest in the amount of $32,583.16, jointly and severally. Enter order pursuant to FRCvP 54(b).

Judge James B. Zagel

Appendix C

APR 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL CAMERON AND KAREN CAMERON,

Petitioners,

v.

BEELER, SCHAD AND DIAMOND, P.C.
an Illinois professional corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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April 5, 1990

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IN THE

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OCTOBER TERM, 1989

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v.

BEELER, SCHAD AND DIAMOND, P.C.
an Illinois professional corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Beeler, Schad and Diamond, P.C., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Seventh Circuit Court of Appeals.[1]

[1] The original Petition for Certiorari, dated January 29, 1990, was rejected by the Clerk of this Court for violations of Rule 14.1(a) and Rule 33.1(c). Although Petitioners' Certificate of Service (*see* Appendix D) recites that copies "were hand delivered on March 5, 1990," copies of the second version were not received by Respondent until March 6, 1990. Petitioners'

OPINIONS AND JUDGMENTS BELOW

Contrary to Petitioners' statement, the Order designated as Appendix C in the Petition is not the order "denying JNOV". Pet. at 5. That order, along with other orders which should have been included in Petitioners' Appendix pursuant to Rule 14.1(k)(ii), are included in Respondent's Appendix as Appendixes E-H.*

COUNTERSTATEMENT OF THE CASE

A. The Jury's General Verdict On The Pet Milk Claim

Because one of Petitioners' claims is that there was inconsistency between the jury verdict and the jury instructions, some clarification of the trial court record is necessary. In 1985, Petitioners requested a fixed fee quotation on the Pet Milk project, and they were given a fixed fee quotation —not an estimate—resulting in a fixed fee contract for $525,000. (Tr. 71-72, 75-76). The only estimate provided by Respondent related to out-of-pocket costs which by their nature could not be "fixed" before the project was complete. (Tr. 73-74). After the Pet Milk project ended and Petitioners delayed payment on the contract, Respondent sent an October 10, 1986 invoice reflecting: (a) the $525,000 fixed fee *less* a $50,000 discount as incentive for prompt payment; (b) plus $24,868.31 of advanced costs; (c) for a total of

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Certificate fails to include the statement required by Rule 29.5 and is not "signed by a member of the Bar of this Court" as required by Rule 29.5(b).

* A copy of Respondent's Appendix (D-O), with all documents reproduced in their original size and format, has been separately lodged with the Clerk of this Court and served upon counsel for Petitioners.

$499,868.31. *See* Appendix O.[2] Petitioners did not pay the bill, which became one of the claims in this lawsuit.

In addition to the above-described express contract theory, Respondent pursued other theories of recovery on the Pet Milk claim, including contract implied in fact and contract implied in law. *See* Appendix N at N4-N6. After being instructed that Respondent "only needs to prove one of these theories to prevail on this claim,"[3] the jury returned a general verdict on the Pet Milk claim in the amount of $499,868.31—the exact amount of Respondent's October 10, 1986 invoice. *See* Appendix M. This general verdict (without any special interrogatories) did not identify which of plaintiff's five theories of recovery it was based on. *Id.*

B. Petitioners' Motion For Judgment Notwithstanding The Verdict

According to Petitioners, the "main issue raised by this case" is "which standard—state or federal—should be applied in a diversity case" in deciding "a motion for *JNOV*." Pet. at 9-10, 13. Petitioners' JNOV motion (*see* Appendix I), however, contained no reference to either a federal or state standard of review, and no such standard of review issue was ever addressed by the trial court, which simply denied the motion without explanation. *See* Appendix E.

C. Petitioners' Briefs In The Seventh Circuit

Similarly, Section II of Petitioners' main brief to the Seventh Circuit (pages 11-18) merely argued that "the jury verdict and the trial court's denial of the JNOV are against

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[2] Petitioners misstate the record when they assert that "[o]n October 10, 1986, the Respondent sent the Petitioners a bill for the alleged 'fixed fee' of $525,000." Pet. at 8.

[3] *See* Appendix N at N2.

the manifest weight of the evidence," without reference to either a federal or a state (Illinois) standard of review. *See* Appendix J at J6. Accordingly, Petitioners made no mention of any alleged conflict between the federal standard and Illinois standard of review, and it was not an issue on review. Respondent's brief to the Seventh Circuit (Plaintiff's Br. at 29-30) simply pointed out that Petitioners' argument regarding a manifest weight of the evidence standard was incorrect. *See Thor Power Tool Company* v. *Weintraub*, 791 F.2d 579, 583 (7th Cir. 1986).

Petitioners, in their reply brief to the Seventh Circuit, again never suggested a conflict between the federal standard and the Illinois standard of review, and never suggested the inapplicability of the Illinois standard as stated in *Thor*. In fact, Petitioners welcomed the application of the Illinois standard and based their reply on that very standard. In that regard, Petitioners stated:

> The plaintiff has stated that the defendants in their original brief, asserted the wrong standard on review. (Plaintiff's Brief pp. 29-30). The defendants suggested that the jury's verdict was against the manifest weight of the evidence. (Defendant's Brief pp. 11-16). In fact, as *Thor Power Tool Co.* v. *Weintraub*, 791 F.2d 579 583, (7th Cir. 1986) clearly states, the standard on review is not the "against the manifest weight of the evidence" or "abuse of discretion" standards but instead, *in Illinois*, it [sic] as follows:
>
> > . . . "Judgment notwithstanding the verdict is properly granted by the trial court only when the evidence is so overwhelming in favor of the movant that no contrary verdict based on that evidence could ever stand." *Id.*
>
> In essence, the *Thor* standard appears to be merely a different way of saying against the manifest weight of

> the evidence. In any event, the outcome should be the same when applying either standard.
>
> The whole concept of the *JNOV* device is it is used to correct unsupported verdicts so that an appellate court will not be faced with that task. In the instant case, the evidence simply did not establish the existence of a contract. (See Defendant's Brief, pp. 11-16). The *Thor* standard dictates that the court must determine whether the evidence is so overwhelmingly in favor of the defendants.

Appendix K at K2-K3 (emphasis added).

D. The Seventh Circuit's Opinion

Now, despite having based their argument to the Seventh Circuit on the Illinois standard of review, Petitioners are criticizing the Seventh Circuit for applying the Illinois standard.[4] Additionally, Petitioners are arguing for the first time that there is a material conflict between the federal and Illinois standards of review, without offering any basis for this conclusion. Likewise, Petitioners offer no basis for their conclusion that the alleged conflict was material to the Seventh Circuit's decision—*i.e.*, that application of the federal standard would have altered the Seventh Circuit's decision. *See generally* Pet. at 9-15.

E. The Petition For Rehearing

Finally, Petitioners fail to address the fact that their petition for rehearing filed with the Seventh Circuit also contained no reference to the above-mentioned standard of review issue. *See* Appendix L.

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[4] *See* the Seventh Circuit's opinion, Appendix A at 6-8.

REASONS WHY THE PETITION SHOULD BE DENIED

Summary Of Reasons

Contrary to Petitioners' claim, this Petition has absolutely no relevance "to the entire federal court system at large." Pet. at 19. It is nothing more than a thinly-veiled attempt at persuading this Court to give Petitioners yet another bite at the apple regarding purely factual issues resolved by the jury in a simple contract suit under state law.

The so-called standard of review issue should be rejected for the reasons stated by this Court in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959), and *Mercer* v. *Theriot*, 377 U.S. 152 (1964). Petitioners should not be heard to complain that the Seventh Circuit applied precisely the same state standard that Petitioners relied upon in their reply brief before that court. Moreover, Petitioners' attempt to distinguish *Dick* is based upon obvious record distortions, since this issue was never raised in either the trial court or the Seventh Circuit. This Petition represents exactly the type of "[f]abulous inflation" and "verbal smoke screen" that Justice Frankfurter warned about in *Dick*. 359 U.S. at 455 (Frankfurter, J., dissenting).

The second issue relating to the jury's general verdict should be rejected because it is particularly fact specific with no relevance to the overall federal court system. Even ignoring Petitioners' record distortions, there is more than sufficient evidence in this record to support the jury's verdict on this claim under any or all of the five theories before it.

I. Contrary To Petitioners' Assertions, The Standard Of Review Issue Was Never Raised In, Or Addressed By, The Seventh Circuit

In deciding not to address the standard of review issue which Petitioners now purport to raise, this Court stated in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959):

> But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied. Moreover, although the Court of Appeals appears to have applied the state standard, that court did not discuss the issue. Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same.

359 U.S. at 445. But for the reference to North Dakota (instead of Illinois), this Court's statements in *Dick* are completely applicable here because: (a) both parties assumed that the Illinois standard applied; (b) although the Seventh Circuit applied the Illinois standard, it did not discuss a federal standard; and (c) in the context of this case, the two standards are substantially the same.

With respect to point (a), Petitioners should not be heard to complain that the Seventh Circuit applied precisely the same state standard that Petitioners quoted, relied upon, and argued in their reply brief before that court. Contrary to Petitioners statement at page 14 of the Petition, the parties did *not* raise the issue of different standards of review (in the context of federal versus state standards) in their briefs to the Seventh Circuit. *See* Rule 14.5 ("The failure of a petitioner to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.").

With respect to point (b), the Seventh Circuit never discussed any possible difference between the federal standard and Illinois' standard of review. Consequently, the Seventh Circuit never stated that the Illinois standard "is a more strict standard." Pet. at 14. The Court of Appeals merely noted that the Illinois standard was a "strict standard." *See* Appendix A at 7. Therefore, the record clearly demonstrates, despite Petitioners' assertions, that the issue of whether to apply a state or federal standard was never raised in, or addressed by, either the district court or the Seventh Circuit. *See Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445 (1959); *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 486 (1933) (issue "not assigned as error on appeal to the Court of Appeals; nor did that court mention the matter").[5]

With respect to point (c), it should also be noted that there is little, if any, difference between the Illinois and federal standards. The Illinois standard, which Petitioners espoused in their reply brief before the Seventh Circuit, states that "judgment notwithstanding the verdict is properly granted by the trial court only when the evidence is so *overwhelmingly* in favor of the movant that no contrary verdict based on that evidence could ever stand." *See* Appendix K at K2; (emphasis added). *See also Thor Power Tool Co.* v. *Weintraub*, 791 F.2d 579, 583 (7th Cir. 1986). The most frequently quoted federal standard looks to whether "the facts and inferences point so strongly and *overwhelmingly* in favor of one party that the Court believes that reasonable men could not arrive at a contrary ver-

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[5] *See* Rule 15.1 (strongly admonishing counsel for Respondents of their "obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later") (emphasis in original).

dict. . . ." *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (emphasis added).[6] *See also Federal Deposit Ins. Corp.* v. *Palermo*, 815 F.2d 1329, 1335 (10th Cir. 1987), *quoted in* Pet. at 12 ("all the inferences to be drawn from the evidence are so in favor of the moving party that reasonable persons could not differ in their conclusions."). Further review is unnecessary or inappropriate when the state and federal standards are "substantially the same". *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445 (1959); *accord DeWitt* v. *Brown*, 669 F.2d 516, 523 (8th Cir. 1982) (state and federal tests "similar"); *Longenecker* v. *General Motors Corp.*, 594 F.2d 1283, 1285 (9th Cir. 1979) (two standards "functionally identical"); *McIntyre* v. *Everest & Jennings, Inc.*, 575 F.2d 155, 158 (8th Cir. 1978) ("substantially the same"); *Farner* v. *Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977) ("substantially the same").

Finally, there is more than ample evidence in this record to support the trial court's denial under any standard—state or federal. *See Mercer* v. *Theriot*, 377 U.S. 152, 156 (1964); *DeWitt* v. *Brown*, 669 F.2d 516, 523-24 (8th Cir. 1982); *Simblest* v. *Maynard*, 427 F.2d 1, 5 (2d Cir. 1970).

II. The Jury Verdict Issue Is Particularly Fact Specific And Has No Relevance To The Federal Court System At Large

Petitioners' claim relating to the jury's general verdict has nothing to do with the federal court system at large, and is so fact specific that Petitioners cannot cite any case with facts or instructions even remotely close to the record here. Moreover, Petitioners' claim of inconsistency between the

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[6] Petitioners quote *Boeing* in their Petition. Pet. at 13.

jury verdict and the jury instructions is not even supported by the record.

The jury was instructed that the Pet milk claim was being made "under five different theories", including express contract, contract implied in fact and contract implied by law. *See* Appendix N at N2-N7. Additionally, the jury was specifically instructed that Respondent "only needs to prove one of these theories to prevail on this claim." *Id.* at N2. In deciding this issue, the Seventh Circuit only addressed one of these theories, finding that there was sufficient evidence under the theory of express contract to support the jury verdict. *See* Appendix A at 7. The Court of Appeals therefore found it unnecessary to consider the other theories, noting, for example, that "there is no need to consider the alternative *quantum meruit* theory advanced by the Beeler firm." *Id.* at 7-8.

Initially, Respondent submits that the Seventh Circuit was correct in affirming the jury verdict on the express fee contract. As previously stated, the general verdict in the amount of $499,868.31 was exactly the amount of Respondent's bill for the Pet Milk project.[7] Moreover, as this Court has noted: "Appellate courts should be slow to impute to

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[7] Petitioners also distort the record in at least two other instances. First, they claim that the Seventh Circuit followed "the *Heller* rule" in *Pomer* v. *Schoolman*, 875 F.2d 1262, 1267 (7th Cir. 1989). *See* Pet. at 17. Yet a examination of the *Pomer* decision reveals that the court does not even cite *Heller*, let alone apply "the Heller rule". Likewise, Petitioners claim that in this case "the Seventh Circuit refused to follow the *Heller* rule." Pet. at 17. *Heller*, however, is not even cited in either of the briefs filed by Petitioners in the Seventh Circuit, and it is therefore apparent that "the *Heller* rule" was never raised in, or addressed by, the Seventh Circuit. *See* Appendixes J, K.

juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933). Since the jury's verdict "was possible on the evidence it cannot be attributed to disregard of duty." *Union Pacific R. R.* v. *Hadley*, 246 U.S. 330, 334 (1918); *accord Pomer* v. *Schoolman*, 875 F.2d 1262, 1267 (7th Cir. 1989) ("we are obliged to assume, in the absence of compelling contrary indications, that a jury obeys its instructions . . . ."). *See generally City of Los Angeles* v. *Heller*, 475 U.S. 796, 800-08 (1986) (Stevens, J., dissenting).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

April 5, 1990

Respectfully submitted,

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